

No. 10973

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN EDWARD YATES,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

MAR 26 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California.

LOUIS R. MERCADO, Esq.,

1095 Grant Building,
San Francisco, California.

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FRANK J. HENNESSY, Esq.,

United States Attorney,
Northern District of California.

JAMES T. DAVIS, Esq.,

Assistant United States Attorney,
Northern District of California.
Post Office Building
San Francisco, California.

Attorneys for Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California.

Title 18 USCA Section 455;

In the March 1944 term of said Division of said District Court, the Grand Jurors thereof, upon their oaths, present: That

JOHN EDWARD YATES

(hereinafter called the defendant) on or about the 4th day of February, 1944, in and on board a certain American vessel known as and called the "President Johnson", belonging in whole or in part to the American President Lines, Inc., a corporation created by and under the laws of the State of Delaware, on waters within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state of the United States, to-wit, at Purvis Bay Florida Island, Solomon Island Group, then and there being, with a knife or some sharp instrument, a more particular description of said knife or instrument being to the Grand Jurors unknown, then and there unlawfully, feloniously, wilfully with malice aforethought, and with intent to kill Henry Frederick Olsen, did assault, beat, strike, cut and stab said Henry Frederick Olsen, a male human being, with said knife or sharp instrument, in the side and arm and elsewhere in and upon the body of said Henry Frederick Olsen.

That after the commission of the aforesaid offense by said defendant, the said defendant was first brought into and was found in the City and County of San Francisco, California, within the Southern Division of the Northern District of California, and within the jurisdiction of this court.

FRANK J. HENNESSY

Frank J. Hennessy

United States Attorney [1]

Approved as to Form:

RB McM.

[Endorsed]: Presented in Open Court and Ordered filed, Mar. 8 1944. [2]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday the 11th day of March, in the year of our Lord one thousand nine hundred and forty-four.

*Page numbering appearing at foot of page of original certified Transcript of Record.

Present: The Honorable A. F. ST. SURE,
District Judge.

NO. 28423

UNITED STATES OF AMERICA,

vs.

JOHN EDWARD YATES.

ARRAIGNMENT AND PLEA OF NOT GUILTY

This case came on this day *ex parte*. The defendant John Edward Yates was present in the custody of the United States Marshal and with his attorney Sol A. Abrams, Esq., James T. Davis, Esq., Assistant United States Attorney was present on behalf of the United States.

On motion of Mr. Davis, the defendant was called for arraignment. The defendant was informed of the return of the Indictment by the United States Grand Jury, and asked if he was the person named therein, and upon his answer that he was, and that his true name was as charged, said defendant was informed of the charge against him and stated that he understood the same. Mr. Abrams waived the reading of the Indictment.

The defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty" to the Indictment, which said plea was ordered entered. [3]

After hearing the Attorneys, it is ordered that this case be continued to March 21, 1944, for trial before Hon. Martin I. Welsh, District Judge.

Ordered that the amount of bail be reduced from \$5000.00 to \$2500.00.

Further ordered that in default of bail defendant be remanded into the custody of the United States Marshal and that a mittimus issue. [4]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday the 21st day of March, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,
District Judge

[Title of Cause.]

No. 28423

TRIAL

This case came on regularly this day for trial. The defendant John Edward Yates was present in Court with Sol A. Abrams, Esq., his attorney. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States. Thereupon the following persons, viz:

Mrs. Rita Abrams	Mrs. Gessel Coleman
Helen F. De Paoli	Roland R. Mack
Mrs. Elsie O. Taylor	David A. Lord
Augustine F. Gaynor	Stanley R. Dickover
Rebecca Silverstein	David J. Bermingham
Earl R. Sewall	Mrs. Rose Baron.

twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Davis made a statement to the Court and jury on behalf of the United States. Mr. Abrams made a [5] statement to the Court and Jury on behalf of the defendant. Hobart J. Ehman, Robert A. Bolduc, Henry F. Olson, William A. Collins and Roland F. Picard were sworn and testified on behalf of the United States. Mr. Davis introduced in evidence and filed U. S. Exhibit No. 1. Thereupon the United States rested. John Edward Hayes and John R. DeLora were sworn and testified on behalf of the defendant. Defendant then rested his case. The evidence being closed, and after hearing Mr. Davis and Mr. Abrams, the Court ordered that this case be continued to March 22, 1944, at 10:30 a. m., and the jury, after being duly admonished, was excused until that time. [6]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 22nd day of March, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,
District Judge.

NO. 28423-S

UNITED STATES OF AMERICA,

vs.

JOHN EDWARD YATES.

TRIAL AND VERDICT OF GUILTY

The parties hereto and the jury heretofore impaneled herein being present and complete, the further trial of this case was this day resumed. After argument by the attorneys and the instructions of the court to the jury, the jury at 2:25 p.m. retired to deliberate upon their verdict. At 3:30 p.m. the jury returned into court and upon being asked if they had agreed upon a verdict, replied in the negative. After further instructions by the court to the jury, the jury at 3:35 p.m. again retired to deliberate upon their verdict. At 4:40 p.m. the jury returned into court and upon being

asked if they had agreed upon a verdict, replied in the affirmative and returned the following verdict, which was ordered, viz:

“We, the Jury, find John Edward Yates, the defendant at the bar, Guilty of an assault with a deadly weapon.

AUGUSTINE F. GAYNOR,
Foreman.” [7]

The jury upon being asked if the verdict as recorded was its verdict, each juror replied that it was. Ordered that the jury be excused from the further consideration of this case and from attendance upon the court until further notice.

The defendant was called for judgment. After hearing Mr. Abrams and Mr. Davis, it is ordered that this case be continued until March 23, 1944, at 12 o'clock noon, for the pronouncing of judgment on the defendant herein. It is further ordered that the defendant be and he is hereby remanded into the custody of the United States Marshal and that a mittimus issue herein accordingly.

It is further ordered that the bond heretofore given for the appearance of the defendant herein be, and the same is hereby exonerated and the surties thereon discharged. [8]

District Court of the United States, Northern District of California, Southern Division

No. 28423

THE UNITED STATES OF AMERICA,

vs.

JOHN EDWARD YATES

We, the Jury, find John Edward Yates, the defendant at the bar, Guilty of an assault with a deadly weapon.

AGUSTINE F. GAYNOR

Foreman.

[Endorsed]: Filed Mar. 22, 1944. [9]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday the 23rd day of March, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,
District Judge.

[Title of Cause.]

No. 28423-S

MOTION FOR NEW TRIAL AND JUDGMENT AND SENTENCE

This case came on regularly this day for the pronouncing of judgment. The defendant John Edward Yates was present in the custody of the United States Marshal and with Sol A. Abrams, Esq., his attorney. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called for judgment. Mr. Abrams made a motion for a new trial, which said motion was ordered denied. Mr. Abrams made a motion that the defendant be placed on probation, which said motion was likewise ordered denied. After hearing the defendant and the attorneys, and said defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant John Edward Yates, having been convicted on the verdict of the jury of [10] guilty of the offense charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a U. S. Penitentiary.

Mr. Abrams stated to the Court that he was giving the Court an oral Notice of Appeal. Mr. Abrams made a motion for bail for release of the defendant pending appeal, which said motion was ordered denied. [11]

[Title of District Court and Cause.]

NOTICE OF APPEAL

1. Appellant, John Edward Yates; address, San Francisco County Jail.

2. Offense; assault with intent to kill with deadly weapon.

3. Judgment, entered March 23, 1944.

4. Sentence, 5 years in a Federal Penitentiary.

5. San Francisco County Jail is the place where defendant is now confined.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for

the Ninth Circuit from the judgement above mentioned from the grounds set forth below.

JOHN E. YATES

Appellant.

Attorneys for appellant, A. J. Hennessy, 269 Pine Street, and Louis R. Mercado, Grant Building, both of San Francisco. [12]

1. That the indictment does not state a cause of action.

2. That the verdict is contrary to the evidence.

3. That the verdict is contrary to the law.

4. That defendant's motion for a new trial should have been granted.

5. That the Court erred in his instructions to the jury of the law.

6. That the Court erred in not giving defendant's proposed instructions and other instructions on the law of the case.

7. That the Court erred in admitting certain evidence and in excluding certain evidence.

8. That the Court erred in allowing the prosecutor to introduce a prior arrest in evidence and the prosecutor was guilty of misconduct in so doing.

9. That the defendant was denied a trial by jury.

10. That the Court erred in not instructing the jury as to the offense of assault and that they could return a verdict for the same if they so found from the evidence.

11. That defendant was denied the due process of law and was convicted in violation of the provisions of Amendments 3, 4, 5 and 6 of the United States Constitution and other provisions thereof.

[Endorsed]: Filed Mar. 28, 1944. [13]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 30th day of March, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,
District Judge.

No. 28423

[Title of Cause.]

ORDER REFILING AND SETTLING PROPOSED BILL OF EXCEPTIONS

This case came on this day ex parte, re instructions on record on appeal. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States. Louis R. Mercado, Esq., appeared as attorney for and on behalf of the defendant.

After hearing Mr. Davis and Mr. Mercado, it is

ordered that Mr. Mercado have to and including the 17th day of April within which to file his proposed Bill of Exceptions, and that the 24th day of April, 1944, be and the same is hereby set for settling of the proposed Bill of Exceptions in accordance with an order to be hereafter signed and filed. [14]

[Title of District Court and Cause.]

Mr. Clerk:

Enter our appearances as atty's for the deft. in the above-entitled case.

Dated at San Francisco on 28th day of Mar., 1944.

LOUIS R. MERCADO

Grant Bldg. SF

Address A. J. Hennessy, 269

Pine Street

[Endorsed]: Filed Mar. 30, 1944. [15]

[Title of District Court and Cause.]

ORDER SETTING TIME FOR BILL OF
EXCEPTIONS

It Is Hereby Ordered that the defendant present his proposed Bill of Exceptions to the United States Attorney on April 17, 1944, and that the Bill of Exceptions be settled on April 24, 1944 at 10:00 o'clock A.M. of said day.

Dated: This 31st day of March, 1944.

MARTIN I. WELSH

United States District Judge.

[Endorsed]: Filed Mar. 31, 1944 [16]

No. 28423-S

APPEAL BOND NO. 30381

United States of America,
Southern Division,
Northern District of California.—ss.

Know All Men by These Presents:

That we John E. Yates, as principal, and National Automobile Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of California, as Surety, are held and firmly bound unto the United States of America, in the sum of Twenty-five Hundred Dollars (\$2,500.00), to be paid to the said United States of America, certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 29th day of March, in the year of our Lord, One Thousand Nine Hundred and Forty-four.

The Condition of the above recognizance is such, that, whereas, lately at a District Court of the United States for the Northern District of Cali-

fornia in a suit depending in said Court, between United States of America vs. John E. Yates a judgment was rendered against the said John E. Yates and the said John E. Yates having filed in the Clerk's Office of said Court Notice of Appeal in duplicate, from said judgment in the aforesaid suit, and said appeal is now regularly pending in the United States Court of Appeals in and for the Ninth Circuit to be holden at the City of San Francisco in the State of California and Northern District of California,

Now, Therefore, if the said John E. Yates surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that, in case the judgment be reversed and the cause be remanded for a [17] new trial and render himself amenable to any and all lawful orders and process in the premises, then this recognizance shall be void, otherwise to remain in full effect and virtue. This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rulte 34 of the District Court.

Acknowledged before me and approved the day
and year first above written.

[Seal] JOHN E. YATES

451 Hyde St., San Francisco

[Seal] FRANCIS ST. J. FOX

United States Commissioner for the Northern Dis-
trict of California.

NATIONAL AUTOMOBILE
INSURANCE COMPANY

[Seal] By B. WATSON

B. Watson, Attorney-in-Fact.

(Verification to bond)

CERTIFIED COPY OF POWER OF
ATTORNEY

Form of Bond and sufficiency of sureties ap-
proved.

MARTIN I. WELSH

United States District Judge.

Mar. 30, 1944.

Approved as to form:

W. F. MATHEWSON

Ass't U. S. Atty.

[Endorsed]: Filed Mar. 31, 1944. [18]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE BILL
OF EXCEPTIONS

Notice of appeal having been duly filed in the above entitled matter, and it appearing that the trial District Judge is not present in the Southern Division of the Northern District of California; that telephone communication between San Francisco and Sacramento where the trial District Judge has his Court room are disrupted and the parties hereto were unable to contact said judge; that the Defendant reasonably needs thirty days within which to prepare his Bill of Exceptions and good cause appearing therefor,

It Is Hereby Ordered that the defendant John Edward Yates may have thirty days from this date, to and including the 22nd day of May, 1944, in which to prepare, serve and file a Bill of Exceptions to be used upon the appeal in this matter.

Dated at San Francisco, California, April 24, 1944.

A. F. ST. SURE

District Judge of U. S. Court for the Northern
District of California.

Approved as to Form

JAMES T. DAVIS

Ass't U. S. Atty.

United States of America,
State and Northern District
of California.—ss.

Louis R. Mercado, being first duly sworn deposes and says:

That he is one of the Attorney's for the defendant: that the Trial District Judge is out of the Division; that he can- [19] not be reached at the Court room at Sacramento due to the disruption of telephone communication between San Francisco and Sacramento, he being advised that no information was available as to when he could reach the said Judge by telephone; that the defendant reasonably needs one month within which to prepare, serve and file a Bill of Exceptions to be used upon the appeal in this matter; that one of the reasons being that government attorney was not able due to press of other business to examine defendants proposed Bill of Exceptions and the absence of information requested in a praecipe on file with the clerk of the court.

LOUIS R. MERCADO

Subscribed and sworn to before me this 24th day of April, 1944.

[Seal]

M. E. VAN BUREN,

Deputy Clerk, U. S. District Court, Nor. Dist. of
California

[Endorsed]: Filed Apr. 24, 1944. [20]

[Title of District Court and Cause.]

ORDER SETTING TIME TO TAKE TESTI-
MONY ON BILL OF EXCEPTIONS

Notice of Appeal Having Been Duly Filed in the Above Entitled Matter, and it appearing to the satisfaction of the Court that testimony should be taken in order for the defendant to prepare his Bill of Exceptions and good cause appearing therefor,

It Is Hereby Ordered: That said testimony be taken on Wednesday, May 3, 1944, at 1:30 P.M. in the court room number 276, Post Office Bldg., San Francisco, and that this notice may be served any time this day.

Dated May 2, 1944.

MARTIN I. WELSH

U. S. District Judge.

[Endorsed]: Filed May 2, 1944. [21]

District Court of the United States, Northern Dis-
trict of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,
District Judge.

[Title of Cause]

No. 28432

HEARING ON MATTER OF SETTLEMENT
OF PROPOSED BILL OF EXCEPTIONS,
ETC.

This case came on regularly this day for certain testimony to settle the proposed bill of exceptions. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States. Louis R. Mercado, Esq., appeared as attorney on behalf of defendant. Augustine F. Gaynor, David J. Bermingham and Thomas F. Jones were sworn and testified on behalf of the defendant. Mr. Mercado introduced in evidence and filed defendant's Exhibits Nos. 1 and 2. Ordered that this case be continued to May 4, 1944, at 1:30 P.M. for further hearing. [22]

District Court of the United States, Northern Dis-
trict of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Thursday, the 4th day of May, in the year of our
Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,
District Judge.

No. 28423

[Title of Cause.]

FURTHER HEARING ON SETTLEMENT OF
BILL OF EXCEPTIONS—CONCLUDED

The parties hereto being present as heretofore, the further hearing hereof was this day resumed. John Edward Yates and Sol A. Abrams were sworn and testified on behalf of the defendant. Thereupon the hearing in this case was concluded. [23]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 22nd day of May, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District Judge, sitting in the Northern Division of this Court, at Sacramento, California.

No. 28423-S

[Title of Cause.]

PROPOSED BILL OF EXCEPTIONS ORDERED SETTLED AND ALLOWED

This case came on this day ex parte. Louis R.

Mercado, Esq., was present for and on behalf of the defendant. Emmet J. Seawell, Esq., Assistant United States Attorney, was present on behalf of the United States. After hearing Mr. Mercado and Mr. Seawell, it is ordered that the proposed bill of exceptions be and the same is hereby settled and allowed, in accordance with an order this day signed and filed. [24]

[Title of District Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS
ON APPEAL

Good cause appearing therefore, and upon the stipulation on file,

It is hereby ordered that the within document called defendant's proposed Bill of Exceptions be and the same hereby is settled and allowed of the evidence and proceedings to be used by the parties on the appeal of this case to the Ninth Circuit Court of Appeals.

Dated May 22, 1944.

MARTIN I. WELSH

U. S. District Judge [25]

[Title of District Court and Cause.]

PROPOSED BILL OF EXCEPTIONS

Be it remembered, that on March 21 and 22, 1944, the defendant, John Edward Yates, upon his plea

of not guilty, was tried before a jury before Hon. Martin I. Welsh, District Judge, and the jury returned a verdict of guilty of an assault with a deadly weapon; that thereafter a motion was made for a new trial on the grounds of the insufficiency of the evidence to support the verdict and that the verdict was contrary to law, which motion was denied; that thereafter the Court rendered judgment and sentence of five years in a federal penitentiary; that thereafter a hearing was granted to determine certain matters between the Court and jury on May 3 and 4, 1944; that upon the trial and said hearing the following proceedings were had. [26]

STIPULATION

It was stipulated by and between counsel for the defendant and the government: "That the vessel known as the S. S. 'President Johnson' is an American vessel belonging in whole or in part to the American President Lines, which is a corporation created by and under the laws of the State of Delaware, and also that this occurrence which took place occurred on waters within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State of the United States, to wit, at Purvis Bay, Florida Island, Solomon Islands Group, and that after the occurrence the defendant was first brought into the City and County of San Francisco, within the Southern Division of the United States District Court, and within the jurisdiction of this court.

HERBERT J. EHMAN,

called for the United States.

I am the Captain of the S. S. "President Johnson," and was on February 4, 1944, at which time the "President Johnson" was at anchor in Purvis Bay, Florida Island, Solomon Islands Group. I identify this log as the official log book of the S. S. "President Johnson" for the voyage in question. The first American port the vessel came to subsequent to February 4th was San Francisco. I know both Mr. Yates and Mr. Olsen; they were members of my crew. I made certain entries in the official log book in the regular course of business relating to some trouble that took place between those two men on February 4th.

The log book was introduced in evidence by the government for the limited purpose of showing that the voyage took place. (The log book is marked "U. S. Exhibit 1.")

Cross-Examination

Olsen's rating is that of a Boatswain. A boatswain acts as foreman of the sailors. He is a civilian employee and not [27] in the armed forces of the United States. Yates is a messman. A messman is one who works in the petty officers' mess, taking care of the petty officers and serving their meals, like a waiter. Petty officer Olson is superior in rank to Yates, but he is not over him. Olsen has no connection with the steward's department; Yates waits on him as a waiter, but Olsen is not over him in the

(Testimony of Herbert J. Ehman)

line of duty. Olsen is classed as a petty officer; Yates is not; Yates is a civilian employee on the boat.

ROBERT A. BOLDUC,

called for the United States.

I am an officer in the United States Army and was assigned on or about February 4, to the S. S. "President Johnson", which is an armed transport; on that day I had occasion to treat a man by the name of Henry Frederick Olsen, a boatswain on the vessel. I made a report at that time concerning my examination and treatment of Mr. Olsen. I identify this report as the one in the official log book of the vessel. Olsen had three incised wounds in the right arm and one incised wound in the right chest with a bruise. Incised means puncture. There was one wound in the upper right arm just above the elbow on the under surface, here, about one inch long, but very deep; it involved some muscle fibers which had been cut through, and from that wound most of the bleeding occurred. The second wound was in the forearm on the upper surface, just below the elbow, and that wound involved the muscle which had been herniated through, and the third wound was down by the wrist on the upper surface of the arm; that wound involved muscle also which had been cut through but not completely, some muscle fibers. These were the three wounds on the arm. Then

(Testimony of Robert A. Bolduc.)

there was an incised wound in the right chest wall which had not penetrated the chest wall, just involved muscles, about an inch and a half in size; just below that there was a bruise. Each of the incised wounds were sutured, taking about 20 sutures in all. [28] Olsen has some residual disability in his right arm.

Cross-Examination

Olsen was incapacitated for nine or ten days; he was in the hospital on his back. He returned back to work to light duty and has worked ever since.

HENRY FREDERICK OLSEN,

called for the United States.

My occupation is that of seaman. On February 4, 1944, I was working at that task on the "President Johnson" as a boatswain. I first saw Mr. Yates on the morning of February 4, 1944, in the mess room about twenty minutes to eight. The usual men who ate together were there. I should say about fifteen men were there at that time, they were all petty officers aboard the ship, who ate in the mess. I went in the mess room to receive my breakfast, as I did every morning in the mess room, and there are two tables in the mess room, and I sat down at one of them, and I was about five or ten minutes sitting there waiting for breakfast, and I asked Yates where the other messman was, that I was not waited on at that time. And he said

(Testimony of Henry Frederick Olsen.)

"it don't concern me," and so I told him, "If you don't wait on me I will go and get the third steward". I asked him where the other messman was and he told me it was none of my business. I sat down at the table where the other men were and I waited, and I said to Yates, "Aren't you going to wait on us," and he said, "You are no better than anybody else, and you can wait." Then I went and got the third steward, Bill Collins. That is all that happened at that time. After that I went to Third Steward Collins and told him about the mess room, we were not being served that morning, and I sat down at the table, and I said to Yates, "Aren't you going to wait on us?" And he said, "You can wait, you are no better than anyone else," and finally I ordered my breakfast and I was served by Yates, on or about fifteen minutes to eight. I was served by Yates, he gave me my breakfast and threw it in front of me on the table, in a manner something like this (illustrating). [29]

Q. Did he bounce the plate down on the table then? A. Yes.

Q. Did you have any words with him at that time?

A. No, I got up from the table with the intention of hitting Yates, but I did not.

Q. You did not hit him?

A. No, we got engaged in some kind of a scuffle in the corner of the mess room which ended up in the alleyway outside.

(Testimony of Henry Frederick Olsen.)

Q. When you say some kind of a scuffle, what do you mean? Were any blows struck by either party?

A. No.

Q. You both had your arms around each other, wrestling? A. Something like that.

Q. What took place then?

A. We broke away, and he said to me, "What's the matter with you anyway?" And I told him, "Nothing is the matter with me, all we want is some cooperation and service from you which we haven't had since we left San Francisco."

Q. Then what took place?

A. Then I went back into the mess room and finished my breakfast.

I finished my breakfast about five minutes later. Then I got up and went out from the mess room and started to talk to Collins, the third steward, who was standing out in the passageway, about the general run of the mess. Where I was standing in the passageway there is a kind of stairway leading down to the refrigerator, and where I was standing it was about five or six feet wide. The third steward and I were standing about five feet from the entrance to the mess hall. The passageway extends the full length of the ship. The stairway went down to the frigid air box. I was standing at that point with the steward leaning on the railing with my back toward the mess hall. The third steward was standing in the same position I was, side by side leaning on this rail.

(Testimony of Henry Frederick Olsen.)

Q. Now, what took place then, immediately after you were standing there talking to the third steward? What was the next thing that [30] took place?

A. As I was standing there I felt a stab in the right side of my back and also in my arm, and I looked around, and I saw Yates standing there with a kind of a pointd-looking knife in his hand.

Q. You were talking, as you say, and the first thing you noticed—did you hear anything said before you felt this stab in your side? A. No.

Q. You did not hear any words? A. No.

Q. Where was this stab in the side?

A. It was in the right side.

Q. Right side? A. Yes.

Q. Where, in relation to the front or back of your body?

A. It was in the back of my body.

Q. You say you felt this stab A. Yes.

Q. What was the next thing that you did?

A. Well, I turned around so quickly that I squirmed my body something like this, and I looked around, and I saw Yates standing there with this knife. That is all I remember, I run like everything. The knife was a pointed-looking knife, from what I saw of it, I didn't see much of it; it had a blue blade. I couldn't tell you for sure how long the blade was, but approximately it was on or about ten inches—I would say ten or twelve inches. I couldn't say for sure if it was sharp on both sides or pointed, because I just saw it a mere glimpse, and I

(Testimony of Henry Frederick Olsen.)

ran as fast as I could upstairs. I did not hear anything said. I went to the ship's hospital for first aid.

Q. Do you recall whether or not you were stabbed in any other place?

A. It went in my back and three times in my arm.

Q. The first wound you remember was in the back? A. Yes.

Q. Then you say you squirmed around. Did you turn facing Yates then?

A. Only part ways, my side was toward him.

Q. Do you remember being stabbed in the arm three times?

A. No, I don't remember that, even, it all happened so quickly that I only [31] remember this stab in my back. That is all I do remember. I went immediately to the hospital and remained there about eleven days. I returned to work about March 4th, but I couldn't fulfill the duties at the present time as a boatswain or a seaman. I never had any trouble with Mr. Yates previous to this affair, never any arguments or fights. I have been on the vessel about a year and two months; Yates was on the vessel only for the last trip.

Cross-Examination

I remained in the hospital of the ship about ten days and upon my release returned to my duties as boatswain, but not in full capacity. As a boatswain, I have charge of the seaman; I receive my orders from the mate, which I execute with the sea-

(Testimony of Henry Frederick Olsen.)

man. I am foreman of the seaman. Yates is not a seaman and was not under my immediate supervision and I am not his boss or foreman. I have nothing to do with the mess room, which is under the charge and supervision of the chief steward, but this particular mess room comes under the jurisdiction of the third steward, Bill Collins. If I had any complaint to make concerning the mess room I was supposed to make it to Mr. Collins. I had no trouble with Mr. Yates before February 4th. I never had any words with Mr. Yates nor any difficulty prior to February 4th. I never complained to Mr. Yates about not being served extra portions of ice cream and cake during the trip, nor did I at any time get up and go and get it myself. Mr. Yates never refused to serve me a second helping. On February 4, I got into the mess room about 7:40. Mr. Yates was the only mess boy waiting on the table. I do not know where the other messboy was that morning or if he was in fact sick, but I did inquire as to where the other messboy was. There were not about fifteen others in the mess room waiting to be waited on, but about six to eight men. Yates was working at that time; [32] he was working on all of them.

Q. You were rather impudent, weren't you, wanted to be served quickly?

A. Well, I had to be at work at eight o'clock in the morning.

The mess room opens at 7:30, I had just twenty

(Testimony of Henry Frederick Olsen.)

minutes to be served and eat and get to work; I could finish my breakfast in about ten minutes. Sometimes I would get to the mess room at 7:30, sometimes later, it all varies. There were always two men at all times to wait on the table; this was the first time I found but one man. When I asked Yates where the other man was he told me it was one of my business; I told him it was, and if he didn't show up I would go and get the third steward, Bill Collins, which I did. He was standing outside of the passageway, watching the general procedure of the mess, and I told him there was only one messboy in attendance that morning. I did not tell him that Yates was disrespectful to me. Mr. Collins didn't say nothing to me, he was standing out in the passageway watching the procedure of the mess. I just went back and sat down. No one came in to help Yates. I sat down and I asked Yates, "Are you going to wait upon us this morning?". And he replied, "You can wait, you are no better than anybody else." He was working all that time waiting on people at the table; he was busy. I finally got my ham and eggs by waiting; I was served about a quarter to eight, about five minutes after I had gotten into the place. He set the ham and eggs down in a manner like this, very hard. The plate was ordinary tableware; it did not break nor did any of the food spill out of the plate.

Q. Now, did you finish eating it?

(Testimony of Henry Frederick Olsen.)

A. At that time I got up when the food was set in front of me, with the intention of hitting Yates.

Q. Just a minute, as soon as he laid the plate down in front of you did Mr. Yates say anything to you? A. No. [33]

Q. Did he hit you? A. No.

Q. Did he push you? A. No.

Q. He just merely laid the plate down in front of you and you immediately got up? A. Yes.

Q. With the intention of hitting him?

A. Yes.

Q. Did you jump up?

A. Yes, I jumped up.

Q. You jumped up at him, didn't you?

A. Yes.

Q. How far away was he when you jumped up with the intention of hitting him?

A. He was at the next table.

Q. How far away from you?

A. About ten feet away from my table.

Q. Did you make a dash for him?

A. Yes.

Q. As you made a dash for him you ran ten feet toward him, is that right?

A. He was on the way to the table when I got up from my table and went after him.

Q. He had his back to you and he walked away from you? A. Yes.

Q. As you reached him you struck him, didn't you? A. No.

(Testimony of Henry Frederick Olsen.)

Q. Are you sure of that? A. Yes.

Q. What did you do?

A. He turned around and we got into some kind of scuffle and clench in the corner of the mess room.

Q. Did you say anything when you got up and dashed toward him? A. No.

Q. How did he happen to turn around?

A. That I don't know.

Q. He just happened to turn around as you reached him? A. Yes.

Q. Then you both got into a scuffle?

A. Yes.

Q. In the scuffle didn't you strike him?

A. No.

Q. You did not hit him at all? A. No.

Q. Was he holding your arms?

A. Well, I don't remember the exact position of my arms; when we were in this scuffle we were in some kind of clench, holding onto each other; that is all I know about it.

The scuffle ended up in the passageway from the mess room; I disengaged myself from Yates. Yates did not strike me at all. Yates said to me "What is the matter with you, anyway?" I said "The only thing I ask from you is a little cooperation and service, which we haven't had since we left San Francisco. That is all that was said, and I went back to the mess room and finished my breakfast. I do not know what he did. I was wear-

(Testimony of Henry Frederick Olsen.)

ing a shirt. Yates was wearing a shirt; I did not notice his shirt torn nor did I notice him bleeding anywhere. I finished breakfast a little before eight o'clock and went out of the mess room and engaged Mr. Collins in conversation. This conversation was not about the this situation, but about the general running of the mess room; I was making a general complaint about the mess. I was standing talking to Bill Collins at the entrance of the mess room, with my back to the mess room, facing away from it in the general direction of the stairs that led down into the frigid air box. Collins was standing on my right side. Yates forecastle was in the general direction on my right. I don't know how Yates approached me; I did not see him approach me.

Q. When did you feel the first stab?

A. In my back.

Q. In your back. A. Yes.

Q. Where in your back?

A. On the right side of my back.

Q. You never got any wound in the back, did you? A. Yes, right here.

Q. It was on your chest wall, wasn't it? (Objection)

Q. You had a wound in your side but not on the back?

A. It was right here, wherever that is on my right side.

Q. Is that the first wound you felt?

A. Yes, as far as I can remember.

(Testimony of Henry Frederick Olsen.)

Q. Then you felt the wounds in the arm?

A. Yes.

Q. Did they all come right after each other, or was there any time between each one?

A. They came so fast that I don't remember what [35] happened, I only know I was stabbed and I ran.

Q. You did not hear anything? A. No.

Q. You did not hear Yates' voice? A. No.

Q. Which direction did you run?

A. I ran up the passageway on deck.

Q. Did you run in this direction, or that direction? A. I went in that direction.

Q. You ran in this direction or the direction from which Yates came, is that right?

A. Yes.

Q. Toward this passageway—where did that lead to?

A. That leads up to the forward deck.

Q. You could have gone in that direction, if you wanted to, couldn't you? A. No.

Q. Nothing to impede your progress in that direction? A. No.

Q. Did you raise your arm at all?

A. I don't remember.

Q. At any time?

A. I don't remember that.

Q. You don't remember raising your arms as Yates approached you?

A. No, I didn't know that Yates was approaching me at all before I felt that I was stabbed.

(Testimony of Henry Frederick Olsen.)

Q. At any time before you were stabbed did you raise your arm? A. No.

Q. Your right arm? A. No.

Q. Are you sure of that? A. Yes.

I ran down the passage way as fast as I could, and said as I ran "I am stabbed", or words to that effect. Yates did not follow me, I don't know what he did, he did not follow me. I ran about thirty feet to where there was a stairway leading up on deck, to the ship's hospital; I fell down at the foot of the stairs, due to my speed; then I got up and went to the hospital. I saw Yates occasionally thereafter on the homeward voyage, the first time about three weeks later, but we did not speak to each other. He was not working, he was in confinement in the brig. [36]

Redirect Examination

Their forecastle is on the left side of the passageway downward. The general direction of the stewards' quarters, that is on the left side as you enter that passageway. It is about 150 feet away from the mess room.

WILLIAM A. COLLINS,

called for the United States.

I am employed as third steward on the "President Johnson" and was so employed on February 4th of this year. I first saw Olsen on that morning when he came to me and told me that the serv-

(Testimony of William A. Collins.)

ice in the mess room was rather slow, and I told him to go back and sit down and I would see he got his breakfast. At this time I was in the passageway between the mess room and the galley. Olsen went back to the mess room. Yates was then in the mess room. I next saw Olsen and Yates when they came out of the mess room together, scuffling; they were locked together, wrestling. I saw no blows struck by either party. They broke up voluntarily. The only thing I heard them say at that time is, Yates said to Olsen "What is the matter with you?", and Olsen said "What is the matter with you?" They both broke up right after that. Olsen went back into the mess room and sat down to eat his breakfast, and Yates went back to work in the mess room. I observed Yates at that time and I did not see any cuts or bleeding on him. Yates was wearing an upper, and I noticed after they had broken away that it was torn. The next time that I saw Olsen was after he finished breakfast; about five minutes elapsed from the time I saw them break up and Olsen came out. Mr. Olsen came out of the mess room and came over to me and started to talk to me; his left side was toward the mess room door; we were facing each other.

Q. What was the next thing that took place after that while you were standing there talking?

A. Yates came out of the mess room with a knife and stabbed Olsen with it. [37]

(Testimony of William A. Collins.)

Q. You say Yates came out of the mess room?

A. Yes.

Q. So that at this time, to the best of your recollection, you were facing up in this direction and Olsen facing toward you? A. Yes.

Q. With his left side toward the door?

A. Yes.

Q. And Yates came out of the door?

A. That is right.

Q. Did you see or hear Yates say anything as he came out of the door?

A. He said something about, "I will kill you, you son-of-a-bitch," or words to that effect. I didn't pay much attention to it.

Q. To the best of your recollection that is what he said? A. That is right.

Q. Do you know whether or not at that time he had a knife in his hand? A. Yes, he had.

Q. Did you see the knife? A. Yes.

Q. Will you describe it for us?

A. I did not see it very plainly, but it looked like one of these knives they carry around the ships; nearly all of the crew and everybody carries them. It looked like it was about eight or nine inches in length, or something like that; I didn't measure it. I just saw it at a glance.

Q. Do you recall what the color of the blade was? A. No, I do not.

Q. Do you know whether it was the type of knife that is sharpened on both sides?

A. Yes, it was.

(Testimony of William A. Collins.)

Q. Do you know whether it was pointed or not? A. Yes, it was.

Q. In other words, it was a sort of a sheath type, double-edged blade, about nine inches long?

A. Yes.

Q. You are in charge of the mess room, are you not? A. Yes.

Q. You are familiar with the type of knives that they have in there to clean crumbs off the table?

A. Yes. [38]

Q. Did the mess men, in their occupation, use a similar knife to this?

A. No; they used ordinary table knives.

Q. Ordinary table knives; I presume sharp only on the one side? A. Yes.

Q. Not pointed?

A. No, they are not pointed.

Q. Do you know, in your capacity as third steward, whether there is any use for this type of knife in Yates' possession in connection with his duty as a mess man?

A. No, there is not.

Q. Now, at that time, you saw Yates come out of the mess room, and then you saw him stab Olsen?

A. He must have stabbed him. Olsen left right after that, and there was blood dropping on the deck.

Q. Do you know about how much time elapsed during this?

A. It was instantaneous; about five seconds.

(Testimony of William A. Collins.)

Q. Did you or did you not see Olsen throw up his arms at any time?

A. I don't remember; I could not say.

Q. The next thing you know Olsen turned and ran, in what direction?

A. He ran what they call on the ship aft, toward his quarters.

Q. That would be down in this direction?

A. Yes; down.

Q. Down this way? A. Yes.

Q. Did you have any conversation with Yates after Olsen ran away? A. None whatsoever.

Q. You did not say anything to him?

A. No.

Q. Did you see what he did after that?

A. Yes; he went back in the mess room and went to work.

Cross-Examination

I did not see the quarreling in the mess room, only outside in the passageway, when they came out holding on to each other. I saw them disengage themselves, and saw Yates and Olsen go back in the mess room. Still later, Olsen came out and talked to me in the passageway, right by the stairway leading down into the refrigerator box. I was facing, and looking away [39] from the mess room; my back would be to the passageway. The entrance to the mess room was nearly directly opposite the place where I was standing. He would have his right side toward the mess room. I am not sure

(Testimony of William A. Collins.)

that Yates came out of the mess room; as far as I remember he did; but I am in doubt, he could have come up from the forecastle; I could be mistaken.

Q. But at any rate you saw Yates about the entrance to the mess room, isn't that right?

A. That is right.

Q. And at that moment did you see Olsen raise his arm or hand? A. I don't remember.

Q. Could he have done it and you not notice it?

A. He could have, yes.

Q. Then you saw Olsen run in this direction down the passageway, is that right?

A. That is right.

O. In doing that he went in the general direction of Yates, didn't he? In other words, toward Yates, rather than away from him?

A. No; he went away from Yates then.

Q. Away from him? A. Yes.

Q. At the time he started to run was Yates at his side?

A. Well, he was right around there, because as soon as the thing happened he went back into the mess room.

Q. It all happened in less than a minute; this all happened in just seconds? A. Yes.

Q. You and Olsen were standing facing each other, talking there? A. Yes.

Q. Yates was off on your side, is that right?

A. That is right.

Q. Coming from your side? A. Yes.

(Testimony of William A. Collins.)

Q. Approaching you? A. Yes.

Q. At that moment Olsen started down this way? A. That is right.

Q. And at the same moment you saw a knife in his hand, is that right? A. Yes.

Q. Did you see Yates stab Olsen.

A. Yes, he made a pass at him.

Q. What is that?

A. He made a dash at him. [40]

Q. Wasn't Olsen running in his direction, past him at that moment?

A. No; when Olsen started to run he ran past me, between me and Yates.

Q. He went between you and Yates?

A. Yes.

Q. Right on down the passageway?

A. Yes.

Q. What did Yates do, stand right there?

A. No; he went back in the mess room and went back to work.

Q. He did not follow him? A. No.

Q. He did not run after him? A. No.

Q. He just went right back into the mess room?

A. That is right.

Q. You did not get a very good look at that knife?

A. No, I did not get a very good look; I just got a glance at it. It looked like a knife that I have described.

(Testimony of William A. Collins.)

Q. But you just got a glance of it?

A. Yes.

Q. Did he take the knife back into the mess room?

A. As far as I know.

Redirect Examination

My left side was toward the mess room: Olsen was facing me, with his right side toward the mess room. The first glimpse I had of Yates was when he was opposite the mess room, and as far as I know, I think he came out of the mess room with a knife in his hand. At the time Olsen was stabbed he was standing still. It was not until after he was stabbed that he started to run. At that time he ran past me and Yates was somewhere here at my side.

ROLAND PICARD,

called for the United States.

I am a junior engineer on the "President Johnson" and was so occupied on February 4 of this year. I know both Yates and Olsen. Between 7 and 8 o'clock on February 4 I saw Olsen and Yates together, standing by the P. O. mess hall. I was standing [41] on the ladder going down to the butcher shop at the time. The only thing I saw was when Mr. Olsen put up his hand and hollered, "No, you don't", and started running, and I happened to turn around, and I seen Mr. Yates over

(Testimony of Roland Picard.)

there put a knife into a sheath. Mr. Collins was there at that time. The first thing I heard was Mr. Olsen go up to Collins and say to Collins, "It's getting so a person has to fight for his meals". Yates was not there at that time; I first saw Yates when I heard Mr. Olsen holler, "No you don't". I was standing sideways; I was not facing them at all. I could just see the heads of Olsen and Yates at the time. The next thing I saw was Olsen running, and then I saw him put his knife in a sheath; I saw Mr. Yates put a knife in a sheath. I did not get a good look at it, to tell you the truth, I don't know whether it was a leather sheath; then I saw Olsen running off, I did not see where Yates went after that. Then two bells rang, and I had to go below on my watch.

Cross-Examination

I did not see the scuffle in the mess room. The first I saw was Olsen talking to Collins in the passageway and saying, "It is getting so a fellow has to fight for his meals now". I was standing on the ladder leading to the butcher shop, Olsen was facing the same way I was. I was facing toward the after end of the ship. I was not facing toward the mess room. I heard Olsen say "No, you don't", and about that time Mr. Olsen raised his right arm. And then I saw Mr. Olsen run in this direction, and Yates was alongside of him. I did not see Yates stab him with a knife. All I saw was his arms go up and saw him run down the passage-

(Testimony of Roland Picard.)

way. Yates stood right there and did not chase or run after him.

Redirect Examination

The first thing I heard was Olsen say "No, you don't". He turned toward Olsen with his arms up. I don't know at all [42] whether or not he had been stabbed before that. I did not see Yates stab him after I turned. Immediately after I saw him with his arm up he immediately started to run down the passageway.

JOHN EDWARD YATES,

the defendant, called in his own behalf:

I am thirty years old, married, and my wife has a little girl.

Q. By the way, have you ever been convicted of a felony before?

A. Twelve years before.

Q. What was the charge?

A. It was highway robbery.

Q. Highway robbery? A. Yes.

Q. Were you made an accomplice of some kind?

A. Yes.

Q. That was 12 years ago? A. Yes.

Q. Where? A. Minneapolis, Minnesota.

Q. Have you been in any trouble since that time? A. No.

Q. Just that one time? A. Yes.

(Testimony of John Edward Yates.)

Q. Have you worked constantly and steadily since that time, in the last 12 years? A. Yes.

Q. How long have you been married?

A. A little over three years.

I have been sailing on this coast two years this June. This is my first trip on this army transport. But, I have made numerous trips to the War Zone on other army transports. I have served in the capacity of a mess man. I did not know Mr. Olsen prior to this trip. The only difficulty I had with Mr. Olsen prior to February 4th was that he would get up and help himself to pie and ice cream when he was only supposed to have one piece, and somebody else had to go without, and I had his room to make up, and he would come to me and say, "I want to have my bed made so-and-so," and little things like that, but I just ignored them. I had to make his bed too. There was only enough ice cream and cake to serve everybody once. In other words, to give one piece [43] to a person. Olsen would take more than one portion, he would get up and help himself. This fight took place on February 4th, when I was working alone in the mess room. Ordinarily, there are two of us. The other man was sick and I had to do all the work until after breakfast was started, and then the steward sent me another fellow. In the interim I set the table and got ready for breakfast. I had on a pair of brown pants and shoes and a top shirt. I think Olsen had on a shirt or jacket. I think it was a jacket he had on. I know he had a

(Testimony of John Edward Yates.)

jacket on, because they are not allowed to go to the mess room without a jacket on. I did not see Olsen come into the mess room that morning, but saw him sitting at the second table. He asked me where the other mess man was. I told him I didn't know. "What do you want to eat?" And he said, "Are you going to get the other mess man, or am I going to get the third steward?" And I said, "I am not going to get the other mess man; go and get the third steward." So he went and got the third steward and came back, and the third steward told him there was another man helping me, and the boatswain went over and sat down. Another man at the table had asked me for ham and eggs, and when I got through there I went back and got ham and eggs for Olsen. I got them as quickly as I could and gave as quick service as I possibly could. I did not lay the ham and eggs down a little heavy—no more than usual; there is nothing fancy about it—just slide the plate along. I did not take time to lay them down nice and quiet, but just passed them along. There are 36 to 40 men to feed, and as you stand at the steam table a person will tell you what he wants to eat; you order it up and take it over to him and you go back to the steam table and get what the next one wants. There is nothing fancy about it, and sometimes they reach across and get the plate themselves from the steam table. Sometimes, I slide [44] the plates along the table. It all depends on where they sit. If they sit in the corner, you probably stand on the side and slide

(Testimony of John Edward Yates.)

the plate in. I sat Olsen's plate down a little hard. He said nothing. I had to wait on these people fast this morning; just as quick as you can dish it out and get it over. They have an hour to eat. After I laid the ham and eggs down, I hadn't got five feet from the table when he was up and after me. I turned around and he swung and hit me on the side of the jaw. Right over here. At that time I grabbed his arm, and he was tussling with me and pushing me out of the mess room, and I had my hand' over him, like that, and he reached up and pulled my arm down, and when he did that I said, "What is the matter with you?" And he turned me loose and mumbled something, and he went back and sat down, and I went back to work. I asked him what was the matter and he mumbled something; I don't know what he said. I did not strike him. I was trying to keep him from striking me. I was holding his arm. After I pulled away, he went back and sat down and I went back to work. I went in the mess room and started to work, and my undershirt was torn off, and I was bleeding right across here. By that time, the other man came to help me, and I gave him the keys to my locker, and I asked him to get a white coat out of the locker, and he started to wait on somebody else, and instead of waiting for him, I went back to the locker myself. As I went by the other man I told him I was going back and change my shirt and clean myself up, and I came back to the hallway—the door leading into the mess room. This pass-

(Testimony of John Edward Yates.)

ageway goes to the crew's quarters where my fore-castle is, where I went to change my clothes, that fore-castle is my living quarters and I changed my shirt. I came back toward the mess room up this passageway toward the entrance of the mess room. When I got up here, I saw the boatswain and the third steward standing by the stairway talking. I overheard the [45] conversation and they were talking about the incident and what happened. I walked up to the boatswain, toward both of them. My purpose was to see that he was telling the story about the incident and I wanted to hear whether he was getting the story straight, or telling the truth, or what. I wanted to offer my explanation. When I walked up, he raised his hand at me.

Q. The other man said it ought to be going up and down this way. How far away from the entrance to the mess room door were you standing?

A. No more than about five feet.

Q. You had to go past them in order to go into the mess room?

A. No, they were both facing that way.

Q. You stepped right up to the doorway to the mess room?

A. Yes.

Q. What happened?

A. When I stepped up there the boatswain raised his hand at me.

Q. Did you have a knife in your hand?

A. Yes.

Q. What kind of a knife?

(Testimony of John Edward Yates.)

A. Just a plain knife out of the mess room.

Q. What were you doing with it at that time?

A. Well, at the time I went back to my fore-castle I was going to clean the plates and put them on the table; there is not room for all of them to sit at one time. So when they get through we have to clean plates and set them over. And instead of cleaning plates I went back to the fore-castle.

Q. Did you realize that you were taking the knife back with you? A. No.

Q. Did you know that you had the knife in your hand when you went back to the fore-castle?

A. Well, no, I did not; no.

Q. Were you excited? A. Yes.

Q. Now, when you got back to the fore-castle to change your clothes did you see the knife in your hand—did you remember [46] the knife?

A. Yes, I think I did remember.

Q. Did you take the knife back when you went back toward the mess room? A. Yes.

Q. You were on your way to the mess room?

A. Yes.

Q. What for? A. To go back to work.

Q. To finish up your work? A. Yes.

Q. You say you used that knife in your work?

A. Yes.

Q. To do what?

A. Well, I was supposed to carry that to clean plates.

Q. An ordinary table knife? A. Yes.

(Testimony of John Edward Yates.)

Q. Now, when Mr. Olsen raised his right hand what did you say, what did he say?

A. When he raised his right hand I raised my hand, and when I raised my hand he seen the knife and he started this way, and I jabbed at him like that.

Q. What did you think he was doing when he raised his right hand?

A. I didn't know what he was doing.

Mr. Davis: I object to what he thought.

Mr. Abrams: I think we are entitled to show his frame of mind. That is proper in this case.

The Court: Proceed.

Mr. Abrams: Q. What did you think when he raised his hand?

A. I thought he was going to hit me.

Q. You thought he was going to strike you?

A. Yes.

Q. Go ahead.

A. When I raised my hand he seen my knife, and he came toward me.

Q. He came toward you with his arm up?

A. No, he did not have his arm up when he came toward me.

Q. Then you stabbed at him with the knife?

A. Yes, stabbed at him with the knife.

Q. Did you jab hard? A. No.

Q. When you jabbed him with it did you intend to kill him? [47]

A. I had no intention of even jabbing him with the knife; I was all nervous and excited, and I had no intention on my part whatsoever of doing that.

(Testimony of John Edward Yates.)

Q. Do you remember jabbing him two or three times in the arm?

A. No, I only jabbed at him once.

Q. Did you run after him, or chase him?

A. No.

Q. Do you remember saying, "I'll kill you, you son-of-a-bitch"? Do you remember saying that?

A. I don't remember. I might have said something like that, I don't know; I don't remember.

Q. All you were trying to do was to protect yourself, is that it? A. Yes.

I did not have a sheath or scabbard on my person to hold this knife. I had one of these double edged hunting knives at one time, but did not have one on this trip. Everybody in the crew carries one. They are used for shark or cutting bait, or cutting life rafts loose from the boat in case you have any difficulty. I sold mine last trip to a soldier in the Hebrides Group. The type of ordinary table knife I had in my hand, I would say the handle and blade, were maybe six inches long. Some of them are sharp and some are not. After this happened, I was placed in the brig for the rest of the trip of twenty-eight days coming back and was placed under arrest when I arrived in port. I did not see Olsen the rest of the trip except that I saw him the last week when we were coming in. They took me out on the deck for air an hour every day, and I seen him at work, but did not talk to him.

(Testimony of John Edward Yates.)

Cross Examination

I was arrested in 1932 for highway robbery.

Q. Then you said that you had never been in any other trouble, is that right?

A. I had not.

Q. Isn't it a fact that you were picked up in 1938 for assault [48] and found not guilty?

A. No.

Q. That is not true?

A. I was picked up for investigation with a lot of other people, but that was all there was to it; there was no assault, they had no charge against me on it.

Q. But you were arrested in 1938?

A. No; as a witness. I was picked up with a bunch of other people.

Q. You say there was no charge placed against you? A. No.

Mr. Abrams: I do not think it is fair to ask him as to that. I asked him if he had a felony conviction.

Mr. Davis: Mr. Abrams put this man's character in evidence. I asked him if he had been convicted of a felony, and then if he had ever been in any trouble, and he answered no.

The Court: Proceed.

Mr. Davis: I am inquiring if he was not in any other trouble. That is not under the felony rule at all.

When the boatswain asked me where the other mess man was, I did not say it was none of his

(Testimony of John Edward Yates.)

God-damned business, I didn't say nothing like that. I didn't have any such altercation with him at all. When I brought the ham and eggs to him, I actually did not slam them down in front of him, aside from my custom of sliding anything on that table. I did put them down hard, that is what he got mad about. I didn't get five feet away from the table and at that time he shoved his chair back and came at me and hit me. No one separated us out in the hallway, he turned me loose and I went about my work and he went back to his breakfast. It was about five minutes after this that the incident we are concerned with took place. I don't know if he finished his breakfast, I left him in the mess room. As far as I was concerned, the first wrestling match, or fight, or whatever it was, was over. My shirt was torn and I went to the fore-castle to change it and I took from the mess room to the fore-castle this ordinary [49] table knife. It was not a long, blue bladed, double pointed knife that is carried in a scabbard. It was just a plain knife to eat with. I did not go down to the fore-castle on purpose to get that knife. I did not throw it out of the porthole thereafter. When I came back into the mess room, I threw the knife into the dirty silverware bucket on the floor. When I came back from the fore-castle, Olsen and Collins were standing together. They were not annoying me in any way nor did they address me. I had to pass right next to them. When you walk down the hall you do not get over to the right or left, you walk

(Testimony of John Edward Yates.)

in the middle. I did not rub up against them. I could walk right by them like I walk by anyone else in the hall. Olsen was standing facing the stairway going down to the butcher shop. His back was not toward me, nor was his side toward me. He was right face to face with me. As I came up there, I don't remember saying, "I'll kill you, you son-of-a-bitch". I saw him waving his hands and talking, and I knew he was talking about the incident and telling the steward. I walked over for the purpose of explaining my side of the case and to see if he was telling anything that was not true. I don't remember saying, "I'll kill you, you son-of-a-bitch". I wouldn't say I did not say it. I don't remember saying it. When I went down to change my shirt, I didn't testify I didn't remember whether or not I had the knife with me at that time; I probably had not paid any attention to it. I had it with me. The mess hall to the forecandle is about a half a block on the same level. I walked over to where Olsen and Collins were talking. He raised his arm, and when he raised his arm, I raised my arm, and he seen the knife, and when he seen the knife in my hand, he started toward me and I jabbed.

Q. You mean you only stabbed him once?

A. I only jabbed him once. [50]

Q. Do you remember what part of the body?

A. I don't know just where it was.

Q. Isn't it a fact that you stabbed him in the

(Testimony of John Edward Yates.)

side, in the back here, and that you stabbed him three times in the arm?

A. I don't know whether I stabbed him in the arm or in the side.

Q. But you say you made only just one jab, is that right? A. Yes.

Q. Did you do it very hard?

A. No; just arm's length, like that.

Q. Would you say that you stabbed him, or would you say that he walked into your knife?

A. Well, he was coming this way; I didn't know what he was going to do. He practically walked into it.

Q. What I want to know is, are you trying to give me the impression that you merely threw up your arm in order to protect yourself, and the knife happened to be there and he just walked into it?

A. I didn't say that.

Q. You did definitely stab him with the knife at least once?

A. I jabbed at him with the knife, yes.

Q. And at that time he had merely thrown his arm up. Did you see any knife or weapon in his hand? A. No.

Q. He started to run, and he kept on running after you stabbed him, didn't he? A. Yes.

The knife was an ordinary table knife. Some are sharp and some are dull. I did not notice this knife. None of them are steel plated, they are silver plated. I was in the brig all the way back.

(Testimony of John Edward Yates.)

The brig is on the first deck down from the main deck. When we left Purvis Bay, I was in the brig, and when the soldiers got off, they had no one to take care of me, so they put me up next to the hospital. I was in the room there and I guess they needed the room, so they took me and put me in one of the state- [51] rooms and put a lock on the door. It was called the brig. There was a bed in the room and I was fed the same meals as everybody else on the ship. When I came back from the forecastle, I had no knife other than an ordinary table knife. I just walked up from changing my shirt and as far as I was concerned, the whole thing was over. I saw these two men standing there talking and went up to explain my side of the matter. As I got close to Olsen, he raised his arm and I raised mine. I raised it like that. The knife was in my hand like that. He started toward me and as he started toward me, I jabbed him, and he turned around and kept on going. I only struck him once and as far as I know, it was only one jab.

JOHN R. DE LORA,

called for the Defendant.

I was employed as a porter when this altercation took place between Yates and Olsen in February. I know both Yates and Olsen. I did not see what took place between the two men in the

(Testimony of John R. De Lora.)

mess room, I only seen the part where Mr. Yates stabbed Olsen. I was in the pantry; at the time I was cutting some grapefruit, and I heard the commotion out there, but I didn't see the beginning of the fight, and then I saw Mr. Yates going down towards the forecastle, and he was bleeding, and he had his shirt all torn, and I called back to him, but he kept going, and I didn't have any chance to speak to him, I stayed there, and when I was almost finished there Mr. Yates was coming back, and he had a clean shirt on, and I seen him pass right next to me, and I seen him with a knife. A saw he had a common table knife in his hands. He was walking toward the mess room, and as he got near Mr. Olsen and Collins I seen Mr. Olsen dash toward Mr. Yates, and I seen Mr. Yates put up his hand like to strike a blow. I saw Olsen's hands up. Olsen was the one that was going toward [52] him, and then Mr. Olsen jumped back when he seen the knife, and then came toward him again, and that is when I seen Yates jab him with the knife, and then Mr. Olsen run down the alley toward the forecastle. Mr. Yates went in the mess room. That is all that happened; that is all I seen.

Cross Examination

I was standing there when Yates came back. I saw Mr. Olsen start to rush toward Yates. They were about two or three feet apart. Yates was still walking toward Olsen, toward the mess room. To get to the mess room, he had to go by Mr. Olsen. From the direction I saw Yates, I would say he

(Testimony of John R. De Lora.)

was going to go by and go to work. He came at Yates with his hands up, like he was going to punch him. His hand was up; it was like he was rushing out to grab him. I don't remember whether he had both hands up. I remember he had one hand up—he rushed forward with his hand up. I couldn't say whether he had both hands up. It was both hands. My best recollection is he rushed out with both hands, not with one hand—he had them as if he was going to grab Mr. Yates. Only one of Mr. Yates' hands came up, I think. That is the hand that had the knife. Yates' hands were like you would go to block a blow. The knife was sticking down. He threw his hand up, because I could see the whole knife. I am sure the blade was sticking out this way, and not pointed the other way. I seen Yates jab at Olsen with the knife. Mr. Yates jabbed at Mr. Olsen with the knife like this. When Mr. Olsen was going toward him I seen Mr. Yates jab him. The first thing I saw was Olsen coming out after Yates with both hands up and then Yates threw his hands up like he was going to ward off a blow, with the knife this way. Then Mr. Olsen must have jumped back. His hand down his side. Then Olsen started toward him again. He was coming right toward him. He could not very well [53] around him, because one man can block the passageway there very easy. I don't believe the passageway is five feet wide; I believe it is about two feet wide; where this took place, it is larger

(Testimony of John R. De Lora.)

there. I will say he stabbed Mr. Olsen as he was going toward him—as Olsen comes directly toward him, he reaches out and stabs him. I did not see where the blow landed. I did not see Mr. Yates' hand move back and forth more than once. I would say it was a very light blow. I just seen that once. I don't know where he stabbed him. Then Mr. Olsen jumped back and rushed right past him, down the alley toward the forecastle. [54]

The Court (Orally): Ladies and Gentlemen of the Jury, if I may now have your attention I will instruct you as to the law of the case in the light of which you will determine what your verdict will be.

It is my duty to instruct you on the law of this case; and it is your duty as jurors to follow the law as given to you in these instructions and to apply the law thus given to you to the facts in evidence before you.

It is the duty of the jury to give uniform consideration to all of the instructions herein given, to consider the whole and every part thereof, and to accept such instructions as a correct statement of the law involved.

On the other hand, I charge you that it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose. You are the sole judges of the weight, effect and value of the evidence, and of the credibility of the witnesses.

In this case the defendant, John Edward Yates, is charged with the crime of assault with intent to commit murder. The indictment alleges that the crime occurred on or about the 4th day of February, 1944, on an American vessel called the SS President Johnson, belonging to the American Lines, Inc., a Delaware corporation, at the time the vessel was on waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state of the United States, at Purvis Bay, Florida Island, Solomon Island Group.

The indictment further charges that at the time and place mentioned, the defendant, unlawfully, feloniously, wilfully, and with malice aforethought, by means of a deadly weapon, to-wit, a knife or sharp instrument, made an assault upon the person of Henry Frederick Olsen, stabbing and wounding the said Henry [55] Frederick Olsen with the intent then and there wilfully, unlawfully, feloniously, and with malice aforethought to kill and murder said Henry Frederick Olsen.

It is further alleged that after the stabbing the defendant was brought to San Francisco, this being the District to which the defendant was first brought after the stabbing.

The fact that an indictment has been filed against the defendant is not to be considered by you as any evidence of the defendant's guilt. The indictment is merely a legal accusation charging a defendant with the commission of a crime; it is not,

(Testimony of John R. De Lora.)

however, evidence against any such defendant, and does not create any presumption or inference of the defendant's guilt, and you are not to consider such fact in arriving at your verdict.

The defendant is presumed to be innocent of the crime charged against him. This presumption of innocence attaches at the beginning of the trial. It has the weight and effect of evidence in the defendant's behalf, and continues to operate in the defendant's favor throughout all the stages of the trial. When you finally retire to the jury room to deliberate upon a verdict, it becomes your duty to consider the evidence introduced in this case in the light of this presumption. This presumption is sufficient to acquit any defendant charged with a crime unless it is overcome by evidence that satisfies your mind to a moral certainty and beyond a reasonable doubt of the guilt of the accused, and unless you, and each of you, are so satisfied, it is your duty to find the defendant not guilty.

It is not necessary for the defendant to prove his innocence; the burden rests upon the prosecution to establish every element of the crime with which a defendant is charged to a moral certainty and beyond a reasonable doubt. [56]

A reasonable doubt is a doubt resting upon the judgment and reason of him or her who conscientiously entertains it from the evidence in the case. It is a doubt based upon reason. By such a doubt is not meant every possible or fanciful conjecture

that may be suggested or imagined, but a fair doubt based on reason and common sense, and growing out of the testimony in the case. A reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence in the case, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

The law under which the defendant John Edward Yates is charged in this indictment in an Act of Congress known as Title 18 United States Code Annotated, Section 455, which provides in part as follows:

“Whoever shall assault another with intent to commit murder” shall be punished according as the law provides.

An assault is an assault with an intent to commit murder when it is committed with a deadly weapon and with intent to kill the person assaulted, done unlawfully and intentionally and with malice aforethought, and under such circumstances that, had death resulted therefrom to the person assaulted, the killing would have been murder.

Murder is the unlawful killing of one human being by another, with malice aforethought.

Malice may be defined as an intent to do injury to another [57] *Malice may be defined as an intent to do injury to another.* Malice in law does not necessarily mean hate or ill-will, but consists in any unlawful act wilfully done without legal excuse therefor.

Malice is otherwise defined as the doing of a wrongful act without just cause or excuse in such a way and under such circumstances as to show that it is done wrongfully and in the absence of that which would give the party the right to defend against it; or that it was done in the absence of mitigating circumstances. It is otherwise defined as the doing of a wrongful act without just cause or excuse, and in such a way as to show that he who does it has a heart void of social duty and a mind fatally bent upon mischief. Anything that shows deliberation, anything that shows a premeditated purpose to do a wicked or wilful act that might result in death, is evidence that may be considered by the jury as evidence of malice and of the existence of malice aforethought.

A deadly weapon is any weapon which is likely to produce death or do great bodily harm. The fact that a deadly weapon has been used may be a circumstance from which together with all the other facts and circumstances in the case the jury may infer malice.

An assault is an unlawful attempt, coupled with a present ability to commit a violent injury upon the person of another.

Implied malice means that which may be inferred from acts and facts shown. Thus, when a wanton, wicked, cruel or revengeful act is shown, the inference or implication may be drawn that the person who did such an act was actuated by malice.

When one person assaults another with a deadly weapon, that is a weapon that will likely produce death, the law presumes [58] malice from that fact alone, in the absence of proof, either direct or implied, to the contrary. The selection and use of a weapon likely to produce death in a deadly manner, without legal cause, raises a presumption and is evidence of malice.

You are instructed that you may take into consideration whether it is true that the defendant made any declaration or statement at the time or immediately before the assault as to what his intentions were, and also his testimony regarding his intentions at the time of the assault, if any. However, verbal statements or admissions should be received by you with caution, as they are subject to imperfection and mistake, owing to the person speaking not having possibly clearly expressed his meaning, or the person spoken to not having possibly clearly understood the speaker. But when such verbal statements are precisely given, and identified by intelligent and reliable witnesses, they are entitled to weight and credit.

Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable

person that another designs to commit a felony or some great bodily injury upon him and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, attack and even slay his assailant and be justified by the appearances.

A person may repel, force by force, in defense of person, property, habitation or life, against one who manifestly intends or endeavors, by violence or surprise to commit a known misdemeanor or felony, or either, or to do great bodily injury to his person, and the danger which would justify the defendant in the act charged against him may be either real or apparent, and the jury are not to consider the defendant was in actual peril of his [59] life or property, but only whether the indications were such as to induce a reasonable person to believe that he was in such peril of person, property, habitation or life. And if he so believed reasonably and had sufficient cause so to believe, and committed the act complained of under such belief, even though it would appear that the other person was not armed, you must acquit the defendant.

The court instructs the jury that the acts which a defendant may do and justify under a plea of self defense depend primarily upon his own conduct, and secondarily, upon the conduct of the party assailed. There is no fixed rule applicable to every case, though certain general principles, well estab-

lished, stand forth as guides for the action of men and measures for the jury's determination of their deportment.

The court instructs the jury that the mere apprehension of danger is insufficient to justify an attack. The fear must have been produced by circumstances such as would be sufficient to excite the fears of a reasonable person. The law of self defense is founded upon necessity, and in order to justify the assault of another upon this ground, it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm, but it must also appear to the defendant's comprehension, as a reasonable person, that to avoid such danger it was absolutely necessary for him to use a deadly weapon at his assailant, if you find that the defendant was assailed.

In every crime there must exist a union or joint operation of act and intent, and for a conviction both elements must be proven to a moral certainty and beyond a reasonable doubt. Such intent is merely the purpose or willingness to commit such act. [60] It does not require a knowledge that such act is a violation of law.

The jury are the sole judges of the credibility of the witnesses and the weight to which their testimony is entitled. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which the witness testified, by the character of such testimony, or by con-

tradictory evidence. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or to the defendant, the manner in which the witness might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

If you find that the presumption of truthfulness attaching to the testimony of any witness has been repelled, then you will give the testimony of such witness such credibility, if any, as you may think it entitled to.

A witness may be impeached by the party against whom he was called, by contradictory evidence; by evidence that he has made at other times statements inconsistent with his present testimony; or by evidence that he has been convicted of a felony.

If you believe that any witness has been impeached, then you will give the testimony of such witness such credibility, if any, as you may think it entitled to.

If you believe that any witness has been impeached, then you will give the testimony of such witness such credibility, if any, as you may think it entitled to.

If a witness is shown knowingly to have testified falsely [61] on the trial touching any material

matter, the jury have a right to distrust such witness' testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony, except insofar as he has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

In all criminal cases the defendant may be found guilty of any offense necessarily included in the offense charged in the indictment. Title 18 USC Section 455 also includes the following:

"Whoever with intent to do bodily harm and without just cause or excuse, shall assault another with a dangerous weapon, instrument or other thing", shall be punished as the law provides. Thus a defendant charged with an assault with intent to commit murder, as is the defendant here, may be found guilty of assault with a dangerous weapon.

If you are satisfied from the evidence beyond a reasonable doubt that the defendant, at the time and place alleged in the indictment, with a deadly weapon, reasonably calculated and likely to produce death or serious deadly injury from the manner in which it was used, and with malice aforethought, assaulted Henry Frederick Olsen with intent then and there to kill him, you may find the defendant guilty of an assault with intent to murder.

If after a careful consideration of all the testimony in the case you are satisfied beyond a reasonable doubt that the defendant committed the assault alleged, but you are not satisfied that it was

his intention to kill Henry Frederick Olsen, you may find the defendant guilty of an assault with a deadly weapon.

The court cautions you to distinguish carefully between the facts testified to by the attorneys in their arguments or [62] presentations as to what facts have been or are to be proved. And if there is a variance between the two, you must, in arriving at your verdict—to the extent that there is such variance—consider only the facts testified to by the witnesses; and you are to remember that statements of counsel in their arguments or presentations are not evidence in the case. If counsel upon either side have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are.

On the other hand, however, if counsel have stipulated or agreed to certain facts, you are to regard the facts so stipulated and agreed to by counsel as being conclusively proven.

In determining what your verdict shall be, you are to consider only the evidence before you. Therefore, any testimony as to which an objection was sustained by the court, and any testimony which was ordered stricken out by me, must be wholly left out of account and disregarded.

It is your duty as jurors, as I have stated, to try this case as to the facts, upon the evidence introduced at the trial, and upon the law as given you by the court in these instructions. The court, how-

ever, has not attempted to embody all the law applicable to the case in any one of these instructions, but in considering any one instruction, you must construe it in the light of and in harmony with every other instruction given, and so considering and so construing, apply the principles in it enunciated to all the evidence admitted upon the trial.

The indictment contains one count. Your verdict must be unanimous.

When you retire to your jury room to deliberate, you will [63] select one of your number as foreman or forewoman. He or she will represent you as your spokesman in the further conduct of this case in this court. The clerk will hand you forms of verdict.

After you have reached your verdict your foreman will sign the particular form of verdict which accords with the determination reached by you in this case, and you will then return into court with the same.

Any exceptions.

Mr. Davis: We have none.

Mr. Abrams: I *expect* to your Honor's refusal to give requested instruction No. 12. Your Honor omitted it or did not wish to give it, I don't know. It sets out the other two lesser offenses, and your Honor did not mention them to the jury.

The Court: They are not in the instructions given.

Mr. Abrams: Your Honor omitted them?

The Court: Yes.

Mr. Abrams: May I note an exception.

The Court: Yes. The jury may now retire.

(The jury retired at 2:25 P. M. and were brought into court at 3:30 P. M.)

The clerk will call the roll of jurors. (Roll called and all answered present.)

Ladies and Gentlemen of the Jury, the court received this note from your Foreman: the Jury would like to have read the instructions concerning self defense; the jury is concerned whether action in self defense is justifiable in the event of initial provocation. Signed Augustine F. Gaynor.

The court will read to you again the instructions on self defense; please give the court your attention. [64]

Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony or some great bodily injury upon him and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, attack and even slay his assailant and be justified by the appearances.

A person may repel, force by force, in defense of person, property, habitation or life, against one who manifestly intends or endeavors, by violence or surprise to commit a known misdemeanor or felony, or either, or to do great bodily injury to his person, and the danger which would justify the defendant in the act charged against him may be either real or apparent, and the jury are not to

consider whether the defendant was in actual peril of his life or property, but only whether the indications were such as to induce a reasonable person to believe that he was in such peril of person, property, habitation or life. And if he so believed reasonably and had sufficient cause so believe, and committed the act complained of under such belief, even though it would appear that the other person was not armed, you must acquit the defendant.

The court instructs the jury that the acts which a defendant may do and justify under a plea of self defense depend primarily upon his own conduct, and secondarily, upon the conduct of the party assailed. There is no fixed rule applicable to every case, though certain general principles, well established, stand forth as guides for the action of men and measures for the jury's determination of their deportment.

The court instructs the jury that the mere apprehension of danger is insufficient to justify an attack. The fear must [65] have been produced by circumstances such as would be sufficient to excite the fears of a reasonable person. The law of self defense is founded upon necessity, and in order to justify the assault of another upon this ground, it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm, but it must also appear to the defendant's comprehension, as a reasonable person, that to avoid such danger it was absolutely necessary for him to

use a deadly weapon at his assailant, if you find that the defendant was assailed.

Is that sufficient, Ladies and Gentlemen of the Jury?

The Foreman: Yes.

(Thereupon the jury retired and returned into court at 4:40 P. M. with a verdict of guilty of an assault with a deadly weapon.) [66]

May 3, 1944

The Clerk: United States v. Yates.

Mr. Mercado: If Your Honor please, may the record show that the defendant has filed a praecipe in this case which called for all of the communications by and between the Court and the jury, or if they were not available, to have the Clerk certify the true contents thereof, and that thereafter the Clerk advised me that Your Honor's memory was not clear as to what the exact contents were, and you directed that I notify the foreman of the jury and bring him here to testify as to the contents of those communications. Is that correct, Your Honor?

The Court: Yes.

AUGUSTINE F. GAYNOR,

called as a witness for the defendant.

My name is Augustine F. Gaynor and I was foreman of the jury in the case of United States vs. Yates. I recall that the jury received instructions from the Court while the jury was seated in the jury box and that thereafter we left to deliberate. Subsequently, we were recalled to the jury box and received further instructions from the Court, after which we retired for further deliberations. We received communications from the Court. Our first communication to the Court was a written request asking for the log of the boat on which it was charged the crime was committed. This communication was a memorandum in long hand written by myself. We knocked on the door and handed it to one of the court attaches. I do not see the attache in court now. We received a response from the Court which was a typewritten message from the Judge delivered to us by the same court attache to whom we delivered our original message. The note from the Court said, in effect, that the jury was not entitled to the log, as, I believe the reason was, that it had not been introduced in evidence. That is my con- [67] clusion. I would say it was about five lines on letter size paper, typewritten on letter size paper. This note I tore up, and as I do with all memoranda, threw it in the toilet bowl and flushed it through. Subsequently, we sent a second communication to the Court, which was a long-hand message, written by myself and sent through

(Testimony of Augustine F. Gaynor.)

an attache of the court. I recall only the substance of that communication. I would say the request was that the jury would like to have re-read to them the Court's instructions on self defense. The response from the Court was an instruction from the attache, who told us to come into Court and take our seats in the jury box, at which time the Court gave us certain instructions on self defense. We then retired from the courtroom for further deliberation. Subsequently, we sent another message to the Court, which was a written message, the same as the other messages, in long hand, by myself, through the court attache. The message asked if the jury was at liberty to return any verdict other than the two possible verdicts that were typewritten and given to the jury by the court clerk when they first went into the jury room. I am giving you the substance of this message. In my pocket, if you wish me to refer to it, I have written out what I think I wrote in that message. (With leave of Court, the papers were marked Defendant's Exhibits "A" and "B"). These papers were prepared in my office yesterday afternoon, which was Tuesday, at approximately the hour of 1:45, at which time you were present, Mr. Mercado. You asked me to write down these statements, which I did, but you did not read the statements. The statements I wrote down are the substance of my memory and are to the best of my memory, but I am not positive of it. We received a verbal response from the Court to this communication. It

(Testimony of Augustine F. Gaynor.)

was a verbal response and was delivered by the court attache. I do not recognize that court attache [68] in this courtroom.

(Mr. Jones, a courtroom bailiff, was requested to step forward, which he did.)

I am quite positive it was not this gentleman. The attache knocked on the door, the door opened and he stood in the doorway. He did not shut the door behind him; the door was open at the time he delivered the verbal communication. He said: "That one of the verdicts that was before us would have to be our verdict." I am recalling the substance only. There was no other communication or correspondence between the Court and the jury, or the jury and the Court, to the best of my knowledge. Refreshing my recollection, from Defendant's Exhibits "A" and "B", my best recollection is that we sent a third message to the Judge, inquiring if we could give any other verdict outside of the two possible verdicts that were before us.

(Defendant offered the two exhibits in evidence to form part of the bill of exceptions and they were admitted by the Court and marked Defendant's Exhibits "A" and "B").

To the best of my knowledge, it took only a few minutes for the court attache to deliver the verbal message. I did not see anybody else present outside of the door at the time the message was delivered. There were no comments by the members

(Testimony of Augustine F. Gaynor.)

of the jury or myself to the court attache or any comment at all; not a word. He left immediately. I recall the appearance of both the defendant and his attorney, Mr. Sol Abrams, and I did not see them present at any time when these communications from the Court were delivered to us; the defendant was not present. What I have stated here is my best recollection in connection with this instruction, or request from me to the Court, the third one, in which we asked about the verdict, as to the contents of that message. [69]

Q. Do you recall any circumstance as to why you sent that communication? A. Yes, I can.

Q. Will you make an explanation, as brief as possible?

A. If I remember right, there was considerable discussion in the jury room about the case. Some one of the jurors asked could we make a recommendation of probation. Another juror, and I think it was myself, was discussing the matter of simple assault, because in the courtroom there was discussion of five possible verdicts that might be given, and we thought that we could get both questions answered at once by putting down a question which would cover both circumstances, that is, if we could change the typewritten verdict that was given to us by the clerk by adding guilty of such and such a charge, and adding the words, "We recommend probation", or if the jury could change the verdict which might come in with a recommendation of guilt

(Testimony of Augustine F. Gaynor.)

of simple assault. That is why I am quite positive that the question was framed as I have quoted it here.

I would describe the manner in which this court attache delivered the verbal message from the Court as just an answer like you might transmit a message—that it was given in just an ordinary tone of voice a simple answer to our question.

Cross Examination

Questions by Mr. Davis:

There were three communications from me as foreman to the Judge, all of which were written. The first response from the Court was typewritten; the other of the three was verbal and said, "Come into court and take your seats in the box". Referring to Defendant's Exhibits "A" and "B", I prepared these myself, and I am now testifying from the best of my recollection, which was no better yesterday than it is today. I would say that we dealt with the same court attache each time. I would not [70] be positive that I could recognize him if I saw him again as I have served on four cases and I might state that yesterday I did not know I was foreman of the jury until I thought it over, and I might be confused in the case if the man were to walk in here. In giving an explanation as to why I have a clear recollection of how the last communication was transmitted, I said that in the courtroom there had been some mention of five possible verdicts; I think that the attorney for the defendant either brought that fact up in his opening

(Testimony of Augustine F. Gaynor.)

statement to the jury or in his closing statement. I did not hear the Judge make any mention of five possible verdicts, except, I think, that the Judge answered, when Mr. Abrams took an exception, the Judge said, "Only two verdicts could be returned", that he was eliminating the other three. I would not say that you, Mr. Davis, made any reference to five possible verdicts. To the best of my recollection, it was Mr. Abrams, the counsel for the defendant, either in his opening statement or his closing argument, argued that there could be five possible verdicts.

DAVID J. BIRMINGHAM

Called as a witness for Defendant.

(Questions by Mr. Mercado).

I sat on the jury as one of the jurors in the case of United States vs. Yates. After we retired from the jury box the first time, there were three communications that were sent by the jury, through their foreman, to the Judge, and three responses from the Judge. The first communication concerned the log and was a written communication and we received a written response from the Court. As to the exact wording of either communication, I think the first communication simply said: "Your Honor, may the jury have the log?" as best I recall it, signed [71] by the foreman, Mr. Gaynor. That is my best recollection of the substance. Secondly, we made

(Testimony of David J. Birmingham.)

a request for further instructions on self defense, which was answered by an attache calling us back into the jury box; certain instructions were read and we retired again to deliberate. The third request was a written request by the foreman to the Court. As to the language of that, I am not sure whether the note requested whether it was possible to have any other form of verdict than that before us, or whether it asked whether any remmendation could be made by the jury; I am not sure. The foreman read this request to the jury before it went out and this is my best recollection. The response was from a court attache. I recognized him as he was sitting over there just a minute ago. Mr. Jones, I believe, was his name.

(Mr. Mercado: May the record indicate that the witness indicated Mr. Jones; he stepped out of the courtroom.)

When we made our first communication with the Court, I knocked on the door so it could be handed to the bailiff of the court and when Mr. Jones came back with the answer to the third communication, as I remember, he stood in the threshold. He didn't actually come into the jury room because he still had his hand on the door, and he simply pointed to the verdicts that were before us there and said, "Those three were all that were to be considered." I can't remember his exact wording; it was very brief. He didn't speak to anyone in particular. As I say, he was holding the door

(Testimony of David J. Birmingham.)
with one arm and he was standing in the threshold; he was not actually in the jury room; he was just standing on the threshold, holding the door. I could hear all of the words that he was saying very distinctly. The defendant's attorney, Mr. Abrams, was not present at that time. We could not see anybody in the hallway, because Mr. Jones was [72] standing in the doorway. There may have been bailiffs or someone there, but not in the jury room. I imagine that this jury room is about one hundred feet from the courtroom.

(Thereupon, the further hearing was continued until 4 o'clock P.M.)

THOMAS F. JONES

called as a witness for the Defendant.

(Questions by Mr. Mercado).

I am a bailiff or cryer of the court for Judge Goodman at the present time. I recall the case of United States vs. Yates and I was acting as cryer for the Court at that time and was assigned to the jury after the jury retired. There were some communications that went between the Court and the jury. The form of the first communication was in a paper, as I remember correctly—a paper folded and handed to me, the contents I do not know, or have I ever known the contents, delivered to his Honor. I delivered such to him and took from him

(Testimony of Thomas F. Jones.)

a message to the jury and handed it to the deputy U. S. Marshal, and which he handed inside. It was either Mr. Kennedy or Mr. Cain—to be sure, I am not quite sure. The second communication was not sealed, the first was not sealed, as I remember. This was not sealed but folded. I delivered that to His Honor and a message was returned immediately. I believe the message which I returned was in printed form; I am not sure. I did not read this second message, but I did bring the jury back into the courtroom and at that time, certain instructions were read by His Honor, after which, I returned the jury to the jury room for further deliberation. There was a third communication. That was likewise a message, and I believe that was the third and last, and I think the answer I took back verbally. If I remember correctly, [73] it was, “Use the form already provided.” And before the door was unlocked I asked Mr. Kennedy, or Mr. Cain, whoever the deputy was, to please listen to what I had to say to the jury. I don’t know who was foreman, but the door was unlocked; Mr. Kennedy or Mr. Cain was there, and these were the words: “Use form already provided.” That is all. I remember these words quite clearly. At the time His Honor gave me these instructions, I believe Mrs. Morgan, his secretary, was there and I think that is all who were present at the time. The defendant was not present and the defendant’s counsel was not present.

(Testimony of Thomas F. Jones.)

The Court: I think they were communicated with on each occasion.

A. Yes, I believe they were.

The Court: Both attorneys, on both sides.

Mr. Mercado: Well, if there is some dispute on the point, Your Honor, I would like to bring Mr. Abrams here. He said that he received communications as to the first two of these, and we are raising no point as to those; but as to the third communication, neither the defendant nor Mr. Abrams has any recollection of any communication of any kind; they were totally ignorant of their existence.

The Court: Bring *there* here, if you wish.

Mr. Mercado: I will do that.

(Thereupon, further hearing was continued until tomorrow, Thursday, May 4, 1944, at 1:30 o'clock P.M.).

May 4, 1944. 1:30 o'clock P. M.

JOHN EDWARD YATES,

called as a witness for the Defendant.

I am the defendant in this case and was present in court during the taking of testimony, and I heard His Honor instruct the jury in this case prior to their leaving for deliberation [74] and I saw the jury go out for deliberation. The Court instructed the jury in my presence and they then

(Testimony of John Edward Yates.)

retired for deliberation. At one time thereafter, the jury was returned to this courtroom and the Court further instructed the jury on a point of law, after which the jury again retired for deliberation. I was never advised of any other communication by and between the Court and the jury. I was never advised by Mr. Sol Abrams that the jury had made a request for the ship's log or that the Court refused to give the ship's log to the jury. I knew nothing of the Court's refusal to give the ship's log to the jury. I never saw any communication that the foreman or any other member of the jury wrote to the Court, nor was I ever advised of any such communication during the trial or prior to this. I did not hear the bailiff, Mr. Jones here, state to the jury that they must return one of the verdicts submitted to them. I do not know where the jury room is and I never was present at the jury room. Mr. Abrams never advised me that there was a request from the jury for some instructions as to the type or character of the verdict which they could return. Prior to my sentence in my case, I never knew of those verdicts and never saw the verdicts and was never advised of the character or nature of those verdicts, nor did I know the language of those verdicts.

SOL ABRAMS,

called as a witness for the Defendant.

(Questions by Mr. Mercado).

I am an attorney at law and represented Mr. Yates in the case of the United States vs. Yates, tried before His Honor by myself. I was his only attorney. The evidence was taken in the presence of the defendant and I heard the Court [75] instruct the jury in the presence of the defendant, and also heard the Court instruct the jury to retire and I saw them retire for their deliberations. Subsequent to that, I saw the jury return and receive further instructions in this case, after which I saw them retire for further deliberation. I was advised of communications to the Court by the jury, the first communication, I think, was in connection with a request from the jury for an examination of the log book. I think His Honor called us into his chambers, Mr. Davis and I. I don't recall who else; possibly the clerk here. I think His Honor had the written request from the jury, requesting the log book; I am not sure whether His Honor showed it to us, but I think we did see it, and asked our advice on the matter, and I stated an objection to the jury's viewing the log book; I did not think it was proper and I voiced an objection to it; I think Mr. Davis agreed with me that it was not proper, and His Honor too, so it was decided not to show it to the jury; it was not proper. I am not sure, but I think I did see the communication that went from

(Testimony of Sol Abrams.)

the Court to the jury, but my recollection is, I think we did; I think His Honor had it there, but whether he actually read it or not, I am not too sure; I think His Honor had it in his hand at the time while talking to us.

The Court: Don't you recall that I asked both of the attorneys if it was agreeable to present it to the jury?

Mr. Abrams: Yes, and I raised an objection at that time and said I did not think it was proper to show it to the jury, inasmuch as it was only offered for identification, it was not in evidence.

Mr. Mercado: I believe it was in evidence.

A. Only in evidence for a limited purpose, that is right.

Q. Did you ever advise the defendant of this occurrence in [76] the court's *cases*?

A. I don't recall whether I did or not.

The Court: He was not present.

The defendant was not present. I don't recall definitely whether or not I ever advised the defendant of it. I do not recall any discussion with him concerning that at the time. I might have discussed it with him afterwards or while the jury was deliberating further. As to the second communication, I understand the jury requested further instructions on the subject of self defense, following which His Honor called them back into the courtroom and gave them further instructions on self defense, the law of self defense. I don't recall if I saw the particular paper on which the

(Testimony of Sol Abrams.)

jury requested that; I don't recall whether we were called in His Honor's chambers on that, or whether we were simply notified they requested instructions and were being brought in; my recollection is hazy on that.

The Court: Q. You recall they were brought in to the courtroom for further instructions?

A. Oh, I do recall that, yes, and I recall Your Honor giving them further instructions on the law of self defense, in the presence of myself and the defendant and the prosecuting attorney, and everybody else.

The Court was in session at the time the Court did give further instructions and there was no objection by counsel or exception taken to those instructions. I don't recall any particular discussion with the defendant in connection with the second instruction; we might have talked about it while the jury was deliberating; they were deliberating quite awhile and we might have talked about it, I don't recall any particular discussion. I do not recall any third communication between the Court and the jury. I think there was only two. I do not recall the Court ever advising me or any court attache calling my [77] attention to the fact that there had been a third communication between the Court and the jury. Nobody said to me that the Judge had sent a verbal communication to the jury concerning the verdict which they should render. I had no information concerning that prior to sentence, there were just the

(Testimony of Sol Abrams.)

two requests by the jury that we were called in on that I recall; if there were any others, I don't recall them. I don't know of any instructions or requests for instructions between the Court and the jury, concerning probation, leniency, or assault, or simple assault, and I am quite positive in my statement to that effect. As my recollection goes back, I do not recall anything else. If you recall it to me, you might refresh me, but I do not recall anything else.

Q. Was there anything in connection with the case that would particularly make you know that you did not receive such information, particularly in connection with the assault charge?

Mr. Davis: If Your Honor please, I have not objected to any questions so far because this is an informal hearing, and I want to find out the facts as much as counsel does, but I object to this question, I do not think it is proper. The witness has testified as far as his recollection goes that he is positive that he don't know of any other communication. I do not think that it is proper, inasmuch as the question has been asked and answered.

The Court: The objection is sustained.

Mr. Mercado: You did not, of course, advise the defendant of any such occurrence?

A. The only discussion that I remember of having with the defendant, that I recall talking to my client naturally on the subject of the several degrees of assault, and I do remember talking to him and telling him that His Honor would not

(Testimony of Sol Abrams.)

instruct [78] the jury on lesser degrees of assault, as I had requested, and that the jury's deliberations were confined by His Honor's instructions to the charge contained in the indictment, and one degree lesser removed from that, and I remember we talked considerable about that, and that was about the extent of it that I recall; that is about the the extent of it that I recall; that is about the extent two times that the jury requested those things.

Q. Do you recall whether your argument to the jury was taken down by the reporter?

A. I don't know whether it was, or not.

Mr. Mercado: I believe Mr. Lehner was the reporter. Did you take it down, Mr. Lehner?

Mr. Lehner (the reporter): No, I did not, Mr. Mercado.

Mr. Mercado: Q. In connection with your argument to the jury, in view of the fact that the reporter did not take down your argument, did you argue to the jury concerning this lesser degree of offense of assault, or simple assault?

A. Very much so. I centered my argument around that.

Q. You know nothing of any communication between the Court and jury concerning the form or type of the verdict or that dispute in the jury room whether they could or could not return a verdict of simple assault, or probation, or ask for leniency? A. No.

(Testimony of Sol Abrams.)

Q. Did you observe or see the verdicts submitted to the jury?

A. No, I did not examine them.

Q. Were you ever offered the opportunity to see those verdicts?

A. I suppose I could have examined them if I wanted to, but I never thought of it; I knew what they were, I heard His Honor read them, and I knew what the submitted verdicts were.

Q. In other words, as I understand it, you tried the case on the theory that inasmuch as you had submitted the verdict for assault and that the Government had submitted, I believe the [79] record shows, three *constructions* for assault, and you had tried the case on behalf of the defendant on the theory that such instructions would be given and you were never stopped in any argument concerning that point, you had anticipated that such an instruction would be given and you defended the case on that theory?

Mr. Davis: Before he answers, I wish to make an objection, if Your Honor please. I am going to object to that question and any question along that line for the reason, as I understand it, Mr. Mercado filed a *praeceipe* with the clerk to find out what communications, if any, passed between the Judge and the jury. Those communications were not available because they had been destroyed. I understand Your Honor made an order permitting Mr. Mercado to put on oral testimony as to what communications passed between the Court and

(Testimony of Sol Abrams.)

jury for the purpose of preparing a bill of exceptions. I think he is really limited to that in this hearing. I do not see what Mr. Abrams' theory of the case has to do with this hearing, whether he tried the case on one theory or another. I think we are limited to the issue of finding out whether or not there were any communications and if Mr. Abrams knows of the communications.

Mr. Mercado: If it please the Court, my reason for asking that question is this: The record will show that the defendant did request an instruction, No. 12, I believe, on assault. The record will further show that at the conclusion of the trial the Court did not give that instruction. The record will further show that there was an objection on the part of Mr. Abrams to the Court for not giving that instruction, that the Court declined to give that instruction and an exception had been saved; the legal point is whether the defendant had been denied a jury trial by virtue of your Honor's excluding the instruction as to simple assault or assault, I believe, as the statute describes it. [80] Now, the reporter has indicated that there was no basis for my ascertaining what the argument of Mr. Abrams was in the case. The reporter states that the argument was not taken down, and I, therefore, inquired of Mr. Abrams if he argued the point of simple assault. We are here in order to perfect the bill of exceptions as to what occurred. I am unable to determine from the reporter's transcript if he made that argument for

(Testimony of Sol Abrams.)

the reason it was not taken down. Now, I am asking Mr. Abrams this question in order to determine what occurred in connection with his argument of the case. It is important, because if Your Honor did send in this informal instruction to the jury room through a bailiff outside of the presence, and without the knowledge, of either the defendant or the defendant's counsel, I think the argument to the jury is very important in determining whether Your Honor might have erred in submitting any instruction to the jury.

The Court: Objection sustained.

Mr. Mercado: Exception. That is all.

Cross Examination

(Questions by Mr. Davis).

Mr. Davis: Q. Mr. Abrams, you did offer an instruction on simple assault, or lesser offense, did you not? A. Yes.

Q. The Judge refused to give the instruction on the lesser offense? A. That is right.

Q. And gave the instruction on the offense alleged in the indictment which was assault, or attempt to commit murder, or assault with a deadly weapon? A. Yes.

Q. You objected to His Honor's refusal to give that instruction, did you not?

A. I noted an exception.

Q. You noted an exception.

Q. You noted an exception to his ruling?

A. Yes.

(Testimony of Sol Abrams.)

Mr. Davis: That is all. Might I ask Mr. Evensen, the [81] clerk, if he has a copy of the verdicts that were sent in to the jury.

Mr. Evensen: (The Clerk). I never keep the copies. I only keep the original that is signed by the foreman of the jury, which is filed as part of the records of the Court.

Mr. Mercado: But, you do not have any evidence as to any language of the verdicts that was submitted to the jury?

Mr. Davis: As I understand it, the first form was guilty of assault with intent to commit murder.

Mr. Evensen: That is correct.

Mr. Davis: And the second verdict was guilty of assault with a deadly weapon or a dangerous weapon.

Mr. Evensen: That is correct—it was a deadly weapon. Then there was a third one as to simple assault, which I was asked to destroy and not submit to the jury.

Mr. Davis: So, the three verdicts that went to the jury were: Not guilty; guilty of assault with an attempt to commit murder; guilty of assault with a deadly weapon.

The Clerk: Yes.

Mr. Davis: I will stipulate that those were the contents of the three verdicts. [82]

STIPULATION

It is hereby stipulated by and between the plaintiff and the defendant that the within proposed bill of exceptions is in narrative form as far as the interest of justice permits and truthfully represents the evidence and proceedings which took place at the trial and the hearing thereafter and the same may be settled as the Bill of Exceptions of the evidence and proceedings to be used by the parties on the appeal of this case to the Ninth Circuit Court of Appeals.

Dated May 20, 1944.

LOUIS R. MERCADO

Attorney for Defendant

WILLIAM E. LIEHING

Ass't U. S. Attorney for
plaintiff. [83]

[Title of District Court and Cause].

SPECIFICATIONS OF ERROR

The learned Court erred in not giving Defendant's requested instructions on assault and in not giving the three requested instructions by the Government, or either of them, on assault, copies of which are appended hereto, in this:

(a) There is evidence tending to show that the Defendant committed assault only, if anything, in that the Defendant testified that he thought the witness Olsen was attacking him and that he did

not intend or mean to use the knife he had in his hand against Olsen, but only intended to ward off the blow of assailant Olsen, which testimony is corroborated by the only eye witness who observed the actual affray;

(b) The entire case was tried and argued by the Government and the Defendant both on the theory that the evidence justified the return of a verdict of assault if the evidence relevant thereto was believed; whereas, the learned Court permitted the case to be tried and argued both by the Government and the Defendant on the theory that an instruction on assault would be given, lulling Defendant and Defendant's counsel into unfortunate false security, and it was not until the final instructions were given that either the Government or the Defendant, or his counsel, knew that the instructions of assault would not be given, thereby, in fact, depriving the Defendant of a jury trial and the due process of law on the issues upon which the instructions actually were given;

(c) The learned Court erred in not instructing or advising the Defendant that on three occasions the jury had transmitted communications to him and that on the first two of those occasions, only Defendant's counsel was advised of the requests and the Defendant was at all times ignorant of all [84] three requests for instructions; that further the learned Court failed to advise the defendant of his response to the jury except in the second instance when the jury was returned to the courtroom and given further instructions; that on the

third occasion of the request of the jury for further instructions the learned Court further erred in advising his Cryer, outside of the presence of and without the knowledge of either the defendant or his counsel, to go to the jury room and outside of the presence of and without the knowledge of either the defendant or his counsel and instruct the jury on a point of fact and law, the exact nature of the instruction being now impossible of determination due to conflicting testimony as to what was exactly said by the Cryer, although witnesses were in general agreement that he instructed the jury on behalf of the learned Court to return a verdict on the forms submitted to it, which did not include an instruction for assault and on which subject the jury had requested further instructions:

For the reasons stated above in Specifications (a) (b) and (c) the learned Court erred in not instructing the jury to return a verdict for the defendant and in not granting defendant's motion for a new trial in that the verdict and judgment was contrary to the law and evidence in the case and in contravention of defendant's constitutional right and without due process of the law, equal protection of the law, and of a full jury trial, in violation of Articles 3, 4, 5, and 6, of the Amendments to the Constitution of the United States for the reasons stated both severally and separately

and cumulatively in the said Specifications (a), (b), and (c) above.

LOUIS R. MERCADO

Atty. for defendant. [85]

Copy & print instructions of deft. #12, and your #23, as part hereof.

[Endorsed]: Filed Oct. 21, 1944. [86]

GOVERNMENT'S PROPOSED
INSTRUCTION

INSTRUCTION No.

In all criminal cases the defendant may be found guilty of any offense necessarily included in the offense charged in the indictment. Title 18 USC Section 455 also includes the following:

“Whoever with intent to do bodily harm and without just cause or excuse, shall assault another with a dangerous weapon, instrument or other thing”

shall be punished as the law provides. Thus a defendant charged with an assault with intent to commit murder as is the defendant here, may be found guilty of assault with a dangerous weapon. (Plaintiff's Instructions to Jury.)

Dated: March 22, 1944.

As Given,

MARTIN I. WELSH,

U. S. District Judge. [87]

DEFENDANT'S PROPOSED
INSTRUCTIONS

INSTRUCTION No. 12

In all criminal cases the defendant may be found guilty of a lesser offense included in the offense charged in the indictment.

Therefore, the following lesser offenses are included in the offense charged in the indictment, and if you find that the defendant committed an offense you may find the defendant guilty of committing any one or more of the following lesser included offenses:

1. "Whoever with intent to do bodily harm and without just cause or excuse, shall assault another with a dangerous weapon, instrument or other thing."
2. "Whoever shall unlawfully strike, beat, or wound another."
3. "Whoever shall unlawfully assault another."

If you find that the defendant committed an offense and that the offense committed was not that stated in the indictment but one of the above lesser included offenses, then you should so designate in your verdict upon which said lesser included offense above enumerated you find the defendant guilty.

(From Defendant's Proposed Instructions which were not filed.) [88]

[Title of District Court and Cause].

PRAECIPE

To the Clerk of Said Court:

Sir:

Please issue In order to properly prepare the transcript on appeal you are hereby requested to include therein:

1. The indictment of the defendant and his plea thereto;
2. The decision of the court and verdict of the jury;
3. The motion for a new trial;
4. Judgment and sentence of the Court;
5. Notice and order allowing appeal;
6. Bond of Defendant on appeal;
7. The Bill of exceptions;
8. Specification of Errors;
9. This Praecipe;
10. Orders extending time to file Bill of Exceptions March 30, 31, April 24;
11. Appearance of Louis R. Mercado;
12. Order setting time to take testimony May 2, 3, 4 and 22nd;
13. Order settling Bill of Exceptions;
14. Government's proposed instruction #23 and defendant's #12.

LOUIS R. MERCADO

Attorney for dft.

[Endorsed]: Filed Oct. 12, 1944. [89]

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 89, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of *The United States of America vs. John Edwards Yates*, No. 28423-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$7.75 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 6th day of January A. D. 1945.

(Seal)

C. W. CALBREATH,
Clerk

M. E. VAN BUREN
Deputy Clerk [90]

[Endorsed]: No. 10973. United States Circuit Court of Appeals for the Ninth Circuit. John Edward Yates, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 27, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10973

JOHN EDWARD YATES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

The Appellant adopts the Assignment of Errors as his Points on Appeal.

LOUIS R. MERCADO

One of the Attorney's for Appellant.

[Endorsed]: Filed Feb. 13, 1945.